IN THE

Supreme Court of the United States.

MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
ALPHONSINE McGREW,
Defendant in Error.

No.

MOTION TO DISMISS WRIT OF ERROR.

To the Mutual Life Insurance Company, plaintiff in error, and Chickering & Gregory, Esqs., Edward Lyman Short, Esq., attorneys for plaintiff in error.

Now comes the defendant in error by her counsel appearing on her behalf and moves the Court to dismiss the writ of error herein for the following reasons, to-wit:

That this Court has no jurisdiction to entertain this writ of error, because

(1) No federal question was specially set up or claimed in the State Court that tried this case;

(2) No federal question was necessarily, or at all, involved in the decision of this case.

The defendant in error also moves to affirm the decision of the Supreme Court of California herein, on the ground that it is manifest that the writ of error herein was taken for delay, and further, upon the ground that the question on which it is sought to base the jurisdiction of this Court is so frivolous as not to need further argument.

The argument in support of this motion is hereto attached.

RICHARD BAYNE,
H. G. PLATT,
Attorneys for Defendant in Error.

PLATT & BAYNE,
Of Counsel.

Statement of the Case

This was an action brought by the defendant in error against the plaintiff in error in the Superior Court of the City and County of San Francisco, State of California, upon a policy of insurance issued by the plaintiff in error upon the life of Henry McGrew, the husband of the defendant in error, and made payable upon his death to the defendant in error. This policy was issued in Honolulu, Hawaiian Islands, on the 14th day of September, 1892, while said defendant in error and said Henry McGrew were husband and wife, and were there residing. It was payable in New York.

The plaintiff in error pleaded in defense to said action,

(1) That prior to the death of said Henry McGrew the latter became of unsound mind, and a guardian of his person and estate was appointed in proceedings instituted in Honolulu;

(2) That this guardian instituted in Honolulu proceedings for a divorce of said Henry McGrew from defendant in error on the ground of adultery, and that upon the 23rd day of August, 1894, a judgment was entered in said divorce proceedings granting said divorce for said cause;

(3) That by virtue of the laws of the Hawaiian Islands, when a decree of divorce is granted on the ground of adultery of the wife, the husband shall

hold her personal estate forever, and that under said law and said decree of divorce said policy of insurance became the absolute property of said Henry McGrew.

(4) That subsequent to the death of said Henry McGrew the administrator of his estate commenced in Honolulu an action on said policy against said plaintiff in error, and recovered judgment for the amount of said policy;

(5) That said plaintiff in error had paid to the said administrator of the estate of said Henry McGrew the amount of said judgment.

The defendant in error recovered judgment in said Superior Court in the City and County of San Francisco for the amount of said policy, and plaintiff in error appealed therefrom to the Supreme Court of the State of California.

In the Supreme Court of the State of California the plaintiff in error for the first time set up, *but only in its brief*, Art. VIII of the Treaty of November 9th, 1850, between the United States of America and the Kingdom of Hawaii.

The Supreme Court affirmed the judgment of said Superior Court in favor of the defendant in error, but in its opinion made no reference to this treaty or to any rights arising thereunder.

From this judgment of the Supreme Court the plaintiff in error has taken out a writ of error to this Court upon the alleged ground that a federal question is in-

volved in this case, to-wit: That said plaintiff in error had claimed in said Superior Court and in said Supreme Court that, by a treaty concluded between the United States and the Kingdom of Hawaii, it was provided: "That if a question should arise among several claim-"ants as to which of them said goods belonged, the "same shall be decided finally by the laws and judges "of the land wherein said goods are", and that under said Hawaiian laws and said decree of divorce and said judgment rendered by said Hawaiian Court the title to said policy had been decided in accordance with said treaty, and that therefore plaintiff in error was deprived by said California judgment of a right, title, privilege or immunity under said treaty.

Argument.

This writ should be dismissed for want of jurisdiction in this Court to entertain it, because no federal question was *specially set up or claimed in the trial Court.*

This Court has held in numerous cases that a right, title, privilege or immunity under the Constitution or laws of the United States, or under a treaty, *must be especially set up or claimed at the proper time and in the proper way.*

Oxley Stave Co. vs. *Butler Co.*, 166 U. S. 695;
Chapin vs. *Fye*, 179 U. S. 129;
Columbia Water Power Co. vs. *Columbia Electric Company*, 172 U. S. 488;
Brown vs. *Massachusetts*, 144 U. S. 579;

Baldwin vs. *Kansas*, 129 U. S. 57;
Chappell vs. *Bradshaw*, 128 U. S. 134;
Brooks vs. *Missouri*, 124 U. S. 394;
Spies vs. *Illinois*, 123 U. S. 181.

The proper time and the proper way for setting up this right is in the trial Court.

If a party intends to invoke some treaty for the protection of his rights he must so declare in the trial Court. It is not sufficient that his purpose to assert a right under a treaty should be left to mere inference, or that it may be inferred argumentatively from the facts stated in the pleadings.

Zadig vs. *Baldwin*, 166 U. S. 488;
Oxley Stave Co. vs. *Butler Co.*, 166 U. S. 655;
Chapin vs. *Fye*, 179 U. S. 129;
Capital Bank vs. *Cadiz*, 172 U. S. 431.

It is fatal to the jurisdiction of this Court if a party defers until he files his briefs in the State Supreme Court the setting up of such a right, title or privilege, as the mere arguments of counsel form no part of the record.

Zadig vs. *Baldwin*, *supra*;
Parmelee vs. *Lawrence*, 78 U. S. 37;
Baldwin vs. *Kansas*, 129 U. S. 57;
Loeb vs. *Columbia Twp. Trustees*, 179 U. S. 483;
Sayward vs. *Denny*, 158 U. S. 183.

The same reasoning for a long while excluded the opinion of the State Supreme Court from the record. But, though this rule has been relaxed as to this opinion, and it now forms part of the record to be examined,

still it cannot supply what should be shown by a bill of exceptions, an agreed statement of facts, or the pleadings.

Loeb vs. *Columbia Twp. Trustees*, 179 U. S. 485.

In *Armstrong* vs. *Athens*, 16 Pet. 281, it was held that where the federal question does not appear from the record to have been raised by express averment or by necessary intendment in the pleadings in the trial Court, or by the direction given by the trial Court and stated in an exception, it must be entered in the record of the Appellate Court that it was in fact raised and decided; and this entry must appear to have been made by the order of the Court, or by the presiding Judge by order of the Court, and certified by the clerk, as a part of the record in the State Court.

In the case at bar not only was this treaty right not set up in the trial Court, nor included in the assignment of errors taken up to the Supreme Court, but it is not even mentioned in the opinion of the State Supreme Court. It appears only in the briefs in the Supreme Court.

The rule that, if the decision of a federal question was necessarily involved in the case, the fact that it was not specially set up and claimed is not conclusive against a review of such question by the Supreme Court of the United States does not apply to the third class of cases specified in section 709 Rev. Stats. to which class the case at bar belongs.

Yazoo vs. *Adams*, 180 U. S. 14;

Water Power Co. vs. *Street Ry. Co.*, 172 U. S. 488.

If, however, it did apply to this third class, it would not apply to the case at bar because

(1) *It does not appear from the record that the treaty in question was in any way involved in the decision.*

Barring the briefs of counsel filed in the Supreme Court of the State of California, and which are no parts of the record, and the petition of the Insurance Company for a writ of error, which is also no part of the record, there is nothing in this record to show that either in the trial Court or in the Supreme Court of the State of California the Hawaiian Treaty in question was ever considered by either Court, or in any way called to their attention. The opinion of the State Supreme Court did not mention it. This latter Court explicitly referred to the Honolulu decree of divorce, and referred to it as one * * * "which could not have " been obtained here; *and upon a Hawaiian statute* " *which has no force here except by comity*", thus showing by the last words, "by comity", that it was not considering a right under the treaty. That court in its judgment accorded full force and effect to the decree of divorce, likewise to the Hawaiian statute, *but rested its decision on the fact that the defendant in error was not affected by the statute*, by reason of the fact that she was not a resident of nor domiciled in Hawaii at the time the statute could have operated had she been there, but that on the contrary at that time she was domiciled in California, and hence that the Hawaiian statute " had no operation upon her or her personal property

" here; for the law which governs personal property is " the law of the domicile". "In our opinion", said the Court, "the respondent at the time when the Hawaiian " statute took effect was domiciled in California.

(2) *The treaty does not apply to this case.*

Article VIII of the treaty between the United States and the Kingdom of Hawaii, from which article the plaintiff in error has quoted the particular clause upon which it relies, is as follows:

> "The contracting parties engage in regard to the personal privileges that the *citizens of the United States of America* shall enjoy in the dominions of His Majesty the King of the Hawaiian Islands, and the *subjects of his said Majesty* in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to dispose of their personal property of every kind and description, etc., etc., and their heirs or representatives, being *subjects or citizens of the other contracting party*, shall succeed to their personal *goods*, whether by testament or *ab intestato*, and may take possession thereof by themselves or others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said *goods* are shall be subject to pay in like cases. And in case of the absence of the heir and representative such care shall be taken of the said *goods* as would be taken of the *goods* of a native of the same country in like case until the lawful owner may take measures for

receiving them. *And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.* * * * Where on the decease of any person holding real estate within the territories of one party, such real estate would by the laws of the land descend on a *citizen or subject of the other*, were he not disqualified by alienage, such *citizen or subject*, etc. * * *

"*The citizens or subjects of the contracting parties* shall not be obliged to pay, under any pretence whatever, any taxes or impositions other or greater, etc., * * * and each of the two contracting parties engages that *the citizens or subjects of the other* residing in their respective states shall enjoy their property, etc., etc."

Article IX also provides as follows:

"*The citizens and subjects of each of the two contracting parties* shall be free in the states of the other to manage their own affairs, etc."

This treaty does not apply to the case at bar because (*a*) *The treaty was intended to protect only the citizens of the United States and the subjects of the Hawaiian Kingdom, and there is nothing in the record that shows or attempts to show that the defendant in error was a citizen of the United States or a subject or citizen of Hawaii, or that her husband Henri McGrew, or the administrator of his estate, was a citizen or subject of either country.*

The record shows only that Henri McGrew was a *resident* of Honolulu, and that the defendant in error at the date of the divorce was a *resident* of California. It

may be that they were all *citizens* of France, or *subjects* of Great Britain, or of any other country. If such were the fact, the treaty surely could not apply.

The burden of proving that the "*claimants*" in this case are covered by this treaty was upon plaintiff in error, if it intended to claim a right thereunder. In the absence of such showing it can not be said that this treaty right was at all involved in the judgment of the State Court.

(*b*) *This policy of insurance is not covered by the terms of the treaty.*

The treaty provides that the title to any "*goods*" shall be decided by the laws and judges of the country "wherein the said *goods* are".

The object of this Treaty was to make it certain that as to corporeal personal property the title should be governed, not by the law of the domicile of the owner, but by the law of the bodily *situs* of the thing itself. Throughout the Treaty the word "goods" is used in this limited sense.

Article II provides as follows:

> "No duty of customs or other import shall be charged upon any *goods*, *the product or manufacture of one country*, upon importation from such country into the other, other or higher than the duty or import charged upon *goods* of the same kind, the *product or manufacture of*, or imported from any other country."

Article III provides as follows:

> "All *goods* which can legally be exported or

> re-exported from either country to the other, in ships of that other country, shall, when so exported or re-exported, be subject to the same duties, etc., etc., etc., whether exported in ships of the other; and all *goods* and articles of whatever description, not being of the produce or manufacture of the United States, etc., etc., etc."

Article VIII uses the word "goods" in the same sense. This term was clearly not intended to cover intangible property, such as a policy of insurance, as it cannot be said to be *in any land*, but must be in the owner thereof, whereas a horse, a piano, a barrel of sugar, necessarily has a corporeal *situs*, which may be different from the *situs* of its owner.

An insurance policy is simply evidence of a debt, payable upon a contingency (*16 Am. & Eng. Enc. of Law*, 843), an intangible thing, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person (*People* vs. *Eastman*, 25 Cal. 604). This distinction between the actual *situs* of a corporeal chattel and of intangible personal property is clearly pointed out by the Supreme Court of California in *Estate of Fair*, 128 Cal. 612. The question at issue was the taxation of certain railroad bonds that were not physically present in California, but were physically in the State of New York. It was contended that they were not taxable in California, as its constitution provided for taxing only "all property *in the State*". The Court held that "intangible personal property has no " *situs* apart from the domicile of the owner * * *

" that not the paper writing, but the obligation to pay " is the thing of value, and in the nature of things this " can have no actual locality". This Court has said the same thing. In *Kirtland* vs. *Hotchkess*, 100 U. S. 498, it said that a "debt, although a species of intangible " property, may, for the purposes of taxation, *if not for* " *all others*, be regarded as situated at the domicile of " the creditor", and that a bond, "wherever actually " held or deposited, is only evidence of the debt". This holds equally true as to an insurance policy. It therefore is not included in the term "*goods*" as used in the Treaty, as the object of this treaty was to provide for the determining of conflicting claims to the title to tangible personal property by the law of their corporeal *situs*.

(c) *No "question has arisen among several claimants as to which of them said goods belong".*

The defendant in error was not a party to the suit upon the policy in Honolulu, and the administrator of the estate of Henri McGrew was not a party to the suit upon the policy in California. There was no *question* in Honolulu "*among several claimants*" as to which of them this policy belonged. There has been no *question* in California "*among several claimants*" as to which of them this policy belonged, and the insurance company has never claimed to be the owner of the policy. The contingency that would bring the treaty into operation therefore has never arisen.

It will be claimed that this interpretation would deprive the plaintiff in error of any rights under this treaty. If this be a hardship, it is due solely to the language of the treaty, which was never intended to apply to such a case as the one at bar.

(*d*) *If there has been any determination of the ownership of this policy between several claimants, then, by the California judgment, the ownership of this policy has been "finally decided by the laws and judges of the land wherein the said goods are".*

The decision of the State Court that the domicile of the defendant in error at the time of the divorce was in California, though a non-federal question, is in line with the views of this Court upon this subject. In *Anderson* vs. *Watt*, 138 U. S. 706, *Cheever* vs. *Wilson*, 19 Wall. 108, 123, 124, this Court recognized the doctrine laid down by the Supreme Court of California in this case as to the ability of a wife to obtain a separate domicile "in *those cases where the express object of all* " *proceedings is to show that the relation itself ought to* " *be dissolved or so modified as to establish separate in-* " *terests*".

This is such a case. The wife was ejected from her home, she was deprived of all support, and a suit for divorce was instituted. The *fact* of the one domicile of husband and wife was at an end, and the fiction of this unity of domicile ceased when the husband discarded his wife by ejecting her from his home and instituting

proceedings for the dissolution of the bonds of matrimony.

Atherton vs. *Atherton*, U. S. Sup. Crt. (Advance sheets, May 15, 1901, p. 547), is not in conflict.

There is no question as to the jurisdiction of the Honolulu Court in the divorce proceedings in the case at bar. The defendant in error appeared in that case, and jurisdiction was thereby acquired, independent of her domicile. At that time such was her domicile. But after the husband had excluded her from his home, actually turned her adrift on the world, refused her both home and support, she could then change her domicile as she pleased. The husband could not claim the benefit of the fiction of one domicile, and at the same time escape its burdens.

If the defendant in error was domiciled in California at the time of the decree of divorce, the Hawaiian law forfeiting her title to this policy of insurance could not under the treaty take effect, because it was not *the law of the land wherein the said policy was*. The law of the land wherein the said policy was situate, was the law of California, where the owner of the policy was domiciled.

It may be claimed that as this insurance policy was delivered in Honolulu, the contract being made there, it was therefore a Honolulu contract, and must be governed by the laws of Hawaii (*Mutual Life* vs. *Cohen*, 21 Sup. Crt. Rep. 106). This may be conceded as to the construction of the contract of insurance, but it has

no application to a question dehors the contract, to-wit: the question of ownership of the contract. The construction of this policy was not before the Hawaiian or California Court. On its face it was payable to the defendant in error. The only question was whether the Hawaiian law worked an involuntary assignment thereof, a matter entirely dehors the policy.

We therefore respectfully submit that this writ of error should be dismissed.

(a) Because no federal question was especially set up or claimed at the proper time or in the proper way; and

(b) Because no federal question was involved in the decision of the State Court.

Respectfully submitted,

RICHARD BAYNE,
H. G. PLATT,
Attorneys for Defendants in Error.

PLATT & BAYNE,
of Counsel.